

RICHARD GREEN,

Petitioner,

vs.

CHUCK DWYER and
JEREMIAH W. NIXON,¹

Respondents.

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**Case number 4:04cv0610 CEJ
TCM**

The 28 U.S.C. § 2254 petition of Richard Green, a Missouri prisoner, for federal habeas corpus relief is before the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b).

¹Because Petitioner is challenging a sentence to be served in the future, the Attorney General of Missouri, Jeremiah W. Nixon, is added as a proper party respondent. See Rule 2(b), Rules Governing Section 2254.

On June 21, Petitioner filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. (Resp. Ex. H at 3.) The motion was denied on August 1, 2002. (*Id.* at 66-71.) The denial was affirmed on appeal on May 20, 2003. *Green v. State*, 105 S.W.3d 552, 552 (Mo. Ct. App. 2003) (per curiam). The appellate court's mandate issued on June 18. *Green v. State*, ED81753 (Mo. Ct. App. June 18, 2003), <http://www.courts.mo.gov/casenet/cases/searchDockets.do>.

On May 13, 2004, Petitioner signed the pending § 2254 petition, seeking habeas relief on three grounds. It was received four days later.

Respondents argue that the petition is time-barred under 28 U.S.C. § 2244(d) because (a) Petitioner is not entitled to a tolling of the statute of limitations for ninety days after his conviction was affirmed on direct appeal because he did not petition for a writ of certiorari; (b) the statute began to run on June 4, 2003, after his post-conviction appeal ended; and (c) consequently, his petition had to be filed by March 4, 2004, and was not filed until May 13, 2004 – seventy days too late.

Title 28 U.S.C. § 2244(d) provides, in relevant part, as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

...

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is

pending shall not be counted toward any period of limitation under this subsection.

(Alteration added.)

Under § 2244(d)(1)(A), "a state prisoner must file his application for a writ of habeas corpus within one year of the date the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." **Pierson v. Dormire**, — F.3d —, 2007 WL 984104, *5 (8th Cir. Apr. 4, 2007). If a Missouri prisoner does not, as Petitioner did not, seek a writ of certiorari from the United States Supreme Court, then the statute begins to run at the conclusion of his direct criminal appeal "*followed by the expiration of the time allotted for filing a petition for the writ.*" **Smith v. Bowersox**, 159 F.3d 345, 348 (8th Cir. 1998) (emphasis added). The time period for filing a petition for a writ of certiorari is ninety days. See Sup.Ct.R. 13.1. His post-conviction motion was filed within this period. Thus, the statute had not yet begun to run by the time he sought post-conviction review. Consequently, the relevant period is between the expiration of that review process and the filing of his § 2254 petition.

The one-year period "is tolled pursuant to § 2244(d)(2) until the Missouri Court of Appeals has issued the mandate in the state post-conviction case." **Pierson**, 2007 WL 984104 at *6. The mandate issued in Petitioner's post-conviction appeal on June 18, 2003. He then had 365 days within which to file a timely § 2254 petition. His petition was received on May 17.

Therefore, Petitioner's § 2254 petition was timely filed.

Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED that Jeremiah W. Nixon is added as a Respondent.

IT IS FURTHER ORDERED that Respondents are to address the merits of Petitioner's claims **within thirty days of the date of this Order** and are to state whether any claim in the petition is barred by a failure to exhaust state remedies or a procedural bar.

IT IS FINALLY ORDERED that if Petitioner chooses to file a reply to Respondents's amended response, he shall file such reply within **twenty (20)** days of the date the amended response is filed. If Petitioner fails to timely file his reply, the right to file such a reply shall be waived. See Rule 5(e) of the Rules Governing § 2254 Cases.

/s/ Thomas C. Mummert, III
THOMAS C. MUMMERT, III
UNITED STATES MAGISTRATE JUDGE

Dated this 11th day of May, 2007.